

Rent Arrears

The landlord's ability to recover

Section 17: The Landlord and Tenant (Covenants) Act 1995

This section was intended to give protection to former tenants and former guarantors facing liability for arrears of rent and other fixed sums due under a lease.

This section applies where a former tenant has either under an authorised guarantee agreement guaranteed the performance by the incoming tenant of tenant covenants in the lease (including fixed charges payable) or the former tenant remains bound by such a covenant.

Key points

- If a Landlord wishes to pursue a former tenant or a former guarantor for payment of any fixed charge (including rent and service charge) reserved by the lease, the landlord must serve on the former tenant or former guarantor as the case may be a notice setting out details of the claim. The notice must be served within six months of the fixed charge becoming due otherwise the Landlord will lose their right to recover any arrears.
- Section 17(2) relates to notices to be served on former tenants.
- Section 17(3) relates to notices to be served on former guarantors.
- Section 17(4) relates to the amount (exclusive of interest) which the former tenant or former guarantor is liable to pay. This amount cannot exceed the amount specified in the notice unless:
 - (a) his liability in respect of the charge is later determined to be for a greater amount; and
 - (b) the notice informed him of the possibility that his liability would be later determined; and
 - (c) within three months of the amount being determined, the landlord served a further notice confirming that they intend to recover the greater amount (plus interest, where payable).
- The format of the notice must be in accordance with Section 27 to be effective.
- These provisions apply to business, residential and agricultural tenancies regardless of when they were granted.

Putting this into practice:

Scottish & Newcastle plc v Raguz

Colston Property Holdings Limited held the properties known as the Abbey Motor Hotel and adjoining plot of land by way of a lease from National Car Parks Limited.

17 March 1967 Colston Property Holdings Limited granted an underlease to Scottish & Newcastle Breweries Limited of the property known as the Abbey Motor Hotel. The lease term was detailed to expire on 22 March 2062.

7 March 1969 Colston Property Holdings Ltd granted a second underlease to Scottish & Newcastle Breweries Ltd of an adjoining plot of land forming part of the hotel. Again, the lease was detailed to expire on 22nd March 2062.

In each lease Scottish & Newcastle Breweries Limited covenanted to pay the rents reserved subject to rent reviews every fourteen years. The rent review under the first lease was due on 18 April 1995 and under the second lease on 25 December 1996. The reviews were in fact completed on 23 September 2000 and 10th July 2001 following which the rents increased to £68,000 and £16,000 respectively.

12 August 1982 Scottish & Newcastle Breweries Limited agreed to assign their leases to Mr Raguz and Impney Hotel Properties Ltd. There was an implied covenant in each transfer that Mr Raguz would during the residue of the term pay, perform, and observe the rent, covenants, and conditions by and in the registered leases reserved and indemnify Scottish Newcastle Breweries against all actions, expenses, and claims for non-payment of the rent or any part of it or breach of the covenants or conditions

March 1983 Mr Raguz and Impney Hotels Limited disposed of their interest in the leases.

March 1992 The leases became vested in Hotel St James Ltd.

June 1999 Hotel St James Limited stopped paying the rent

6 October 1999 Administrative Receivers were appointed in respect of Hotel St James Limited. The Administrative Receivers paid the rent due at the pre-review level for the period 6th October 1999 to 14th February 2000 only.

- 11 November 1999 On and after this date the Lessor served on Scottish and Newcastle notices, as required by s.17 of the Landlord & Tenant (Covenants) Act 1995, and statutory demands for the purpose of recovering the outstanding rent from the Assignor. The notices referred only to the arrears and did not make reference to the uplift in rent following the reviews.
- 5 July 2001 Notwithstanding the fact that the notices did not make reference to the uplift in rent following the review, Scottish & Newcastle Breweries Limited paid all outstanding rent and sought to recover the same from Mr Raguz pursuant to his indemnity covenants implied into the earlier transfers.
- Mr Raguz refused to pay the uplift in rent on the basis that Scottish & Newcastle were not liable to pay it because it had not been properly demanded by the Lessor under the provisions of Section 17.

It was held that Section 17 notices should have been served on Scottish & Newcastle in respect of the uplift in rent i.e. within six months of every quarter from the date of the review. Notwithstanding this however, the court held that Mr Raguz must adhere to the implied indemnity which he provided to Scottish & Newcastle Limited and he was therefore liable for payment to Scottish & Newcastle Limited.

Indemnity covenant

For leases completed on or after 1 January 1996 there are no indemnity covenants implied and therefore Landlords should ensure that outgoing tenants enter into Authorised Guarantee Agreements whereby essentially the outgoing Tenant guarantees the Landlord that the incoming Tenant will comply with the covenants under the lease, including those relating to payment of fixed charges. As such, the outgoing Tenant will usually obtain an indemnity from the incoming Tenant in respect of payments of rent.

If the outgoing Tenant has obtained a separate guarantee and indemnity from any guarantor of the incoming Tenant, the outgoing Tenant is entitled to claim from that guarantor any sums paid to the Landlord pursuant to either a Section 17 notice or their own commercial reasoning.

Am I safe if there are no arrears?

The answer is no. If for example there is a rent review outstanding, the Landlord should serve a Section 17 notice within six months of each rent payment date. Similar provisions apply with regards to service charge.

Problems for landlords

If a Landlord serves a notice on a former tenant or former guarantor under the provisions of Section 17, that party then becomes entitled to an overriding lease. Therefore, if a Landlord does not want a particular party as a Tenant or indeed the Landlord requires possession of the property the Landlord may wish to make a commercial decision as to whether they should serve a Section 17 notice. Clearly if the notice is not served, the Landlord will lose their right to recovery as detailed above.

Further, service of notice may result in waiver of the breach and may prevent a Landlord from forfeiting the lease.

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